In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 356

I. POSNER, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 19–24) is reported at 342 F. 2d 826. The Board's Decision and Order (J.A. 2–30)[1] are reported at 145 NLRB 1190.

JURISDICTION

The decision of the court of appeals (Pet. 19–24) was filed on March 15, 1965, and its decree (Pet. 25–30) was entered on March 30, 1965. On June 4, 1965, Mr. Justice Harlan extended the time in which

[1] "J.A." references are to the printed record prepared for the court of appeals and filed with the petition.

to file a petition for a writ of certiorari to and including July 16, 1965. The petition was filed on July 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were afforded a fair hearing by the trial examiner.

2. Whether the Board's findings are supported by substantial evidence.

3. Whether the Board properly ordered reinstatement and back pay for the eight employees who had been discriminatorily discharged.

STATEMENT

Petitioners (hereafter "the Company") are a single integrated enterprise engaged in the manufacture, sale, and distribution of cosmetics, hairgoods, and related products (J.A. 9; 32, 343–346). In the summer of 1962, the Union[1] started an organizing campaign among the Company's employees (J.A. 10–11; 36). On August 3, 1962, the Union filed with the Board a petition for a representation election, and on the same day it sent a letter to the Company claiming that it represented a majority of the employees (J.A. 12; 37–39, 356–359). The Company did not reply to the letter (J.A. 12; 40).

[1] District 65, Retail, Wholesale and Department Store Union, AFL–CIO. The Union had made an unsuccessful attempt to organize the employees in 1959 (J.A. 10). The Board found that the Company had engaged in unfair labor practices in this campaign and in 1960. 133 NLRB 1573; 133 NLRB 1567. enforced in part and remanded in part, 304 F. 2d 773 (C.A. 2).

On August 15, while some employees were talking with a Union organizer on the street before working time, Hamilton Posner, the secretary and active head of the Company (J.A. 10), told them that they did not need to check in and that they could let the Union pay for their time. He added that they would never have an election (J.A. 12; 45–46). In the middle of September, while the organizer was talking on the street with an employee member of the Union Committee, Posner told him that he had no right to be there, and called the police (J.A. 12; 49–52, 138–139).[3] And on many other occasions when the organizer spoke to workers in front of the plant on the public street, Posner surveilled the meeting and called out to the employees that he only wanted "friends" to be working for him and that no election would be held (J.A. 12–13; 48–51, 55–56).

The Board also found that the Company had discriminatorily discharged eight of its employees. Norma Pinero, for example, was hired in January 1962, was an active adherent of the Union, and held organizing meetings, the last on July 16, in her home (J.A. 13; 37, 70). On July 20, the Company Supervisor discharged her, stating that Posner was dissatisfied with her work and that she had been talking with other employees (J.A. 13; 74–75, 82). Later, the Supervisor admitted to an employee that Pinero and another employee had been fired because they belonged to the

[3] A police officer appeared in a squad car and left after Union organizers identified themselves and explained that they were talking to employees entering the plant (J.A. 51).

Union (J.A. 14; 95–96, 114–116). In September, when Pinero returned to the plant and asked Posner for work, he told her to go to the Union. When she replied that she did not care for the Union, Posner asked if she was sure and then told her to come back the next month (J.A. 13; 76–77). Pinero returned in October, but Posner told her that there was no work available (despite the fact that he was hiring new employees). He added that Pinero had been laid off because she tried to cause a "revolution" on the second floor (J.A. 13; 77–78).

Ricardo and Marcos Ortiz began wearing Union buttons on August 3, 1962 (J.A. 14; 125, 129, 165). The same day, the Supervisor warned them that if they did not abandon the Union they would be fired, and he asserted that Posner could do more for them than the Union (*ibid.*, and J.A. 166). Later that day, the Supervisor handed Ricardo Ortiz a paper and told him it was a "layoff" slip, but added that he did not know "why" (J.A. 14–15; 166–168, 206). The Company contended that Ricardo's layoff was due to a lack of work, but it hired another helper on July 31, and thereafter rehired two more (J.A. 17; 247, 249–251, 254–255). Marcos became a Union delegate after the discharge of Pinero. In October, when Marcos was talking to a Union official outside the plant, Posner approached them, shook his fist at Marcos, and told him that his work would be confined to the basement and he was not to go again to the second floor (J.A. 16; 135, 146–148). On November 12, after working hours, the Company's plant was

severely damaged by a fire (J.A. 16; 136–137, 296–297). Marcos reported on the following morning, but was told by the supervisor that there would be no work for him, and that he should leave his social security number and return later for his pay. He returned for his pay some days later, but was never recalled to work (J.A. 16; 136–137, 154–155, 159–160). On the day after the fire, other employees had been permitted to remain and help in the salvage operations (J.A. 16; 155–156, 251, 255).

The Board, sustaining the findings of its trial examiner, concluded, *inter alia,* that the Company violated Section 8(a)(1) of the Act by interrogating its employees, threatening them with reprisals, surveilling union activities, and attempting to prevent meetings between a Union organizer and the employees. The Board also concluded that the Company discriminatorily discharged eight employees, thereby violating Section 8(a)(3) of the Act (J.A. 24–25).[4] The Board ordered the Company to cease and desist from the unfair labor practices found, and to reinstate the discriminatees with back pay (J.A. 6, 26–30).

The court of appeals sustained the Board's findings regarding violations of Sections 8(a)(1) and 8(a)(3), and it enforced the portions of the Board's order relating thereto (Pet. 20, 24).[5]

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[4] The Board dismissed the complaint insofar as it alleged that the discharge of a ninth employee, Selwyn Hutchinson, violated Section 8(a)(3) (J.A. 25).

[5] The court of appeals rejected findings that the Company had violated Sections 8(a)(4) and 8(a)(5), and those matters are no longer involved in the case.

ARGUMENT

The decision of the court below is correct and it is not in conflict with any other decision. There is no occasion for further review.

1. Both the Board (J.A. 3, n. 2) and the court below (Pet. 20) properly found that there was no merit to the Company's contention (Pet. 8–13) that the trial examiner was biased against it. The main thrust of the Company's argument is that the trial examiner demonstrated such bias by uniformly crediting the General Counsel's witnesses and discrediting the Company's But is is well settled that "the total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U.S. 656, 659.[6]

The Company also argues that the trial examiner's rulings on objections and his general handling of the hearing, as well as his ultimate substantive decision, establish his bias. The three examples selected from a transcript of over 700 pages (Pet. 9–10) fail to support this charge. They show only that the trial examiner wished to expedite the hearing by confining cross-examination to the ground covered on direct,[7] and that he admonished Company counsel for continuing to argue after a ruling had been made.

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[6] Moreover, it may be noted that the trial examiner rejected the portion of the General Counsel's case alleging that employee Hutchinson was illegally discharged, because, in this instance, he believed the Company's witnesses and disbelieved the General Counsel's (J.A. 23–24). See note 4, *supra*.

[7] See *Bituminous Material & Supply Co.* v. *National Labor Relations Board*, 281 F. 2d 365, 372 (C.A. 8); *Northern Pacific Ry. Co.* v. *Urlin*, 158 U.S. 271, 276.

2. The Company also claims (Pet. 13–16) that the unfair labor practice findings sustained by the court below are not supported by substantial evidence. Such evidentiary issues do not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In any event, the Board's findings are amply supported by the record. The Company claims (Pet. 14) that Pinero and Ricardo Ortiz were discharged before it knew of their Union activity, but the record contains an admission by the Company Supervisor that they were fired for belonging to the Union (pp. 3–4, *supra*). Moreover, while the Company now contends that active Union adherents Coello, Cuellar and Gordon were unsatisfactory employees, none of the three were given this explanation at the time of their discharge. Indeed, at the time Coello and Cuellar were discharged, the only matter discussed was their Union activity (J.A. 20; 103, 119–120). The record shows—contrary to petitioner's claim (Pet. 14)—that employees Ortiz and Santiago did not quit. Rather, they were laid off and not recalled to work after the fire, even though there was work available for them (J.A. 21–22; 189, 250–251, 254–255).

There is no merit to petitioner's claim (Pet. 15–16) that the Board and the court found violations here "without any reference to the facts of the case" because petitioners had shown hostility to the Union in the past. The evidence involved here was more than adequate, and the court of appeals, in reviewing the record, was careful not to give excessive weight to

the Company's past violations, its rejection of the Board's finding that the Company violated Section 8(a)(5) proves as much (Pet. 20–22).[8]

3. Finally, the Company argues (Pet. 15–18) that the Board's order is improper because it requires reinstatement of the eight discriminatees without regard to the fact that the total number of employees had decreased between the time of the discharges and the Board hearing. This contention is barred by Section 10(e) of the Act, for neither in its exceptions to the trial examiner's Intermediate Report nor in its argument to the court below did the Company raise this point. *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318; *National Labor Relations Board* v. *Mine Workers*, 355 U.S. 453, 463–464. In any event, it is well-settled that the Board may leave questions relating to the number of jobs available and other reinstatement matters for the compliance proceedings which take place after a general order such as the Board issued here has been enforced. See, *e.g.*, *National Labor Relations Board* v. *American Steel Building*, 278 F. 2d 480, 482 (C.A. 5); *Wallace Corp.* v. *National Labor Relations Board*, 159 F. 2d 952, 954 (C.A. 4).[9]

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[8] *Textile Workers Union* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (Pet. 16), is inapposite. In that case the employer arguably went out of business entirely. Here, the Company stayed in business, merely curtailing the size of its operations. See *National Labor Relations Board* v. *Savoy Laundry*, 327 F. 2d 370 (C.A. 2), cited in *Darlington* at 380 U.S. 273, n. 19.

[9] *Martel Mills Corp.* v. *National Labor Relations Board*, 114 F. 2d 624, 633 (C.A. 4), and *National Labor Relations Board* v. *National Die Casting Co.*, 207 F. 2d 344, 349 (C.A. 7) (Pet.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LAURENCE S. GOLD,
Attorney,
National Labor Relations Board.

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17) are not to the contrary. In both cases the court found that the discharges in question were based on economic rather than anti-union reasons, and therefore refused to enforce the Board's order at all. Here, on the other hand, violations of the Act have been proved, and the question raised by the Company merely concerns the extent of the relief that may properly be ordered, a matter which was not reached in *Martel Mills* and *National Die*.

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